UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
APR 15 1994
Clerk, U.S. District Court
Central District of California

CRESCENT WHARF AND WAREHOUSE CO., a California corporation dba STEVEDORING SERVICES OF AMERICA, INC. and STEVEDORING SERVICES OF AMERICA, INC., a California corporation,
Plaintiffs,
v.
The Vessel C.C. SAN FRANCISCO, her engines, tackle, apparel, furniture and fixtures *in rem*, and CHAR YIGH MARINE (Panama) S.A., *in personam*,
Defendants.

CV 84-6287 KN

ORDER Re Motion for Reconsideration etc.

This constitutes notice of entry as required by FRCP, Rule 77(d).

The Court has considered Claimant's motion for reconsideration and/or a new trial. The Court DENIES the motion for a new trial and rules as follows with respect to the motion for reconsideration.[1]

Lack of capacity to sue must be raised "by specific negative averment," Fed.R.Civ.P. 9(a). Unless lack of capacity "is raised in an appropriate pleading or amendment," it is waived. *Wagner Furniture v. Kemner's Georgetown Manor*, 929 F.2d 343, 345-346 (7th Cir. 1991) (citing, among other cases, *Summers v. Interstate Tractor and Equipment Co.*, 466 F.2d 42, 49 (9th Cir. 1972)). *Accord In Re Allustiarte*, 786 F.2d 910, 914 (9th Cir. 1986).

Here, Plaintiffs raised the issue of lack of capacity by bringing a motion in limine at the eleventh hour. The issue was not contained in the Pre-Trial Conference Order which supersedes the pleadings. Neither Plaintiffs' timing nor Plaintiffs' vehicle is appropriate under Rule 9(a) and the above-cited case law. For these reasons the Court agrees with Claimant that lack of capacity based on the dissolution of Char Yigh in 1985 was not properly raised by Plaintiffs. The Court therefore **STRIKES** Conclusions of Law 12 and 13.[2]

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[1] The Court rules without the benefit of oral argument despite Claimant's request therefor.

[2] Although Claimant also requests that the Court strike Conclusions of Law 14 and 15, these Conclusions address different issues, and will not be stricken. Nor is it appropriate or necessary to strike Finding of Fact 24, which merely states the uncontroverted fact that Char Yigh was dissolved in 1985. The argument, of course, is the legal effect of the 1985 dissolution under Panamanian law. On this point the parties have submitted conflicting interpretations from Panamanian counsel. Because Plaintiffs had the burden of proof on their motion in limine, even if the Court had decided that the issue of capacity was properly raised therein, Plaintiffs would not have prevailed as the evidence proffered did not adequately support their position.

[Text omitted.]

IT IS SO ORDERED.

DATED: April 13, 1994

/s/ DAVID V. KENYON
DAVID V. KENYON
United States District Judge